Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the	)	MM Docket 92-266
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

COMMENTS OF THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

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January 27, 1993

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SUMMARY

The Community Antenna Television Association, Inc. ("CATA") urges the Commission to adopt rate making regulations that are flexible, self-explanatory, and that recognize the particular requirements of smaller cable television systems.

CATA asserts that the Commission's mandate is not to adopt a punitive regulatory policy, but to assure that cable rates are "reasonable." CATA argues that local authorities are the sole determiners of whether basic service rates are regulated, and proposes that the Commission establish certification rules that will allow the largest communities, serving the largest number of cable subscribers, to seek certification first, then have a sliding time scale for smaller cities, and finally, the smallest communities.

CATA further recommends the Commission permit multiple system owners serving subscribers predominantly in franchise areas with a subscriber base of 3500 or less, to present the Commission with sufficient evidence to show that the financial performance of the entity as a whole is reasonable and creates a presumption of reasonableness for individual system rates.

It is also important that the Commission establish reasonable schedules for rate making procedures and enable cable operators to participate fully. Thus, CATA recommends that the Commission include cable systems in initial certification procedures, and not base certification decisions solely on a local authority's filing.

Moreover, a local authority's review of basic cable rates must be expeditious. Proposed rate increases must be able to go into effect on a date certain. Further, in order to provide for a sensible management of subscriber complaints against a cable system's cable programming tier rates, the Commission should require that any complaint be first sent to the local cable system and then, if sent to the Commission, be accompanied by the system's response.

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The Community Antenna Television Association, Inc. ("CATA") hereby submits its comments in the above-captioned proceeding. As the Commission is aware, CATA is one of the principal national trade associations of cable television operators. CATA's membership, representing systems serving more than 45 million subscribers, spans the breadth of the cable industry with regard to system size from the smallest independent "mom and pop" operator to the largest Multiple System Operator. CATA's mandate from the industry, along with vigorous public advocacy of general industry positions and goals, is to assure that the particular difficulties and circumstances of smaller operators are adequately considered in the legislative and regulatory process. It is with that in mind that CATA targets these comments toward the unique problems and prospects of smaller operators which the Commission needs to consider in the process of this extraordinarily complex proceeding.

INTRODUCTION

Comments will reflect a diverse industry. Several initial comments are necessary. The Commission staff, under unreasonably short time constraints, has analyzed possibly one of the most complex areas, rate regulation of an entire diverse industry, and produced an incredibly detailed, intelligently articulated series of questions that all need to be addressed. There is serious doubt on our part that all the questions raised -- and we think there are even more that need to be aired -- can adequately be deliberated in the time frame currently contemplated by the Commission. We can say with surety that the representatives of smaller cable operators cannot possibly adequately respond to all of the questions and details being asked by the Commission in the myriad of rule makings spawned by the new Cable Law. This is particularly true of this 98-page, 234 footnote rate proceeding. We, instead, will focus narrowly on key issues and leave other parts of the proceeding for others to respond to. We are in constant contact with many of the other parties intending to file in this proceeding and urge the Commission to carefully consider those comments -- particularly those from the National Cable Television Association ("NCTA"), Northland Communications, Mountain Cablevision, and the Coalition of Small Operators. We have actively encouraged our members, particularly the smaller operators, to file individually or in groups in this proceeding. We know that the larger MSOs, likewise, are preparing to file.

In a rule making this complex, with an industry this diverse, that is the only appropriate way to proceed. However, that creates more work for the Commission as it becomes obvious that there is no "one" industry position or perspective. The rules, we are hopeful, will reflect the diversity of the industry.

We fully appreciate that the Commission is operating under deadlines imposed by the law. But as we have said in other proceedings relating to this process, should the Commission find that it cannot give adequate time for the parties in interest to respond, or should it find that the complexity and volume of the regulations sought could result in unintended consequences without further study, we would hope that the Commission would let Congress know of those concerns and seek more time to allow this to be a reasonable rule making process rather than the gauntlet it is presently seen as by all who are participating in it.

Importance of the proceeding. This proceeding, on rate making, is critical. The wrong procedures or the wrong mathematical prescriptions can have massive unintended consequences. Those could materialize as a stagnation of an industry that has led the way for the last decade in the creation of new and diverse television programming for the American public. They could also lead to the unintended forced consolidation of the industry. One potential "unintended consequence" that we think the Commission must consider is not only the elimination of cable in rural America, should the rules and regulations regarding rates be too onerous, but the

consequent potential for elimination of any "localism" in programming available to those rural viewers who could be forced to watch "equivalent" programming via satellite thereby harming local broadcast viewing. We will explore all of these potentials in these comments -- we just wanted to emphasize here that the complexity of this proceeding, particularly as to its potential consequences should be fully appreciated by the Commission and great care should be given to the adoption of any rules.

The mandate is to assure that basic rates are reasonable. What is this rule making all about? What is the Commission supposed to be doing with regard to rates for "basic" cable service? The Commission asks that question and proposes two alternatives: that Congress intended for those rates to be lowered, or that they intended the regulations to act as a check on prospective rate increases. CATA would respectfully suggest that neither is necessarily the case and the Commission need not concern itself with the political psyche of Congress. Instead, it should look to the specific wording of the law.

While the findings of Congress related to the perception of rate increases and "percentages" of increase as compared to the Consumer Price Index, the mandate to the Commission was to assure that basic rates are "reasonable". That reasonability, as the Commission fully explored, is guided by a series of tests and bordered by an allowance of a "reasonable profit" and, again as the Commission pointed out, a legal barrier against creating

rates that would be considered constitutionally infirm because they were confiscatory. In essence the Congress did not, and does not know what "reasonable" rates are. The determination of that question is for the Commission.

Congress did not dictate that the Commission produce a rate structure that is generally lower than the rates in effect today, nor did it necessarily say that rates should not be increased. It just ordered the Commission to create a structure allowing the determination of "reasonable" rates for basic service. Similarly, for the "cable tier" of services, Congress mandated that the Commission create a structure to block the few who may have used undue market power to charge "unreasonable" rates. While noting the percentage increases over the years since deregulation of rates, and while recognizing that the growth of cable as a dominant force in the delivery of video programming, there was no finding that any particular cable rates are in fact "unreasonable" or that the rates charged for basic service are not "reasonable". Those questions are for the Commission to answer in this proceeding.

CATA maintains that the current rates charged by cable operators are eminently reasonable and constitute one of the best values available in video information and entertainment delivery. As we have said before, and we believe will ultimately be decided in court, the government is on very thin legal ice when it decides to regulate the rate of a service that is inherently a value-driven consumer consideration of first amendment speech.

In essence these rules can be seen as a governmental attempt to determine the rate "value" of program services such as CNN, ESPN, C-SPAN etc. Naturally, from a political perspective, since millions of Americans have now indicated that they think there is value in that programming, the Congress wants to satisfy its constituency by assuring "reasonable" rates for those services. But in the process that rate regulation could very well have the unintended consequence of forcing some of those first amendment speakers out of the marketplace, or prevent them from developing the way they would have absent government intervention. We raise this issue not with the expectation that the Commission can or will resolve it, but to make it clear to the Commission that this underlying issue exists and will definitely be taken up in the appropriate forum.

LIFE (OR DEATH) IS IN THE DETAILS

It is to the details that we now must turn in looking at the Commission's rule making proceeding. For the small operator, in particular, the administrative burdens, the legal necessities, the definitions and formulas can mean the difference between providing a wanted service to customers and a decision to simply "close up shop" because of the inherent governmental burdens.

It should be noted, as alluded to above, that in the case of smaller systems, especially in rural areas, there cannot be an assumption that each and every system, if the independent owner

decides that the burdens are too great and chooses to exit from the business, will in fact be purchased by some other private entrepreneur and the service continued. CATA has members who are presently operating systems with such low margins that it is unlikely other private parties would be willing to purchase them. The potential result would be that only a governmental authority or an entity (such as a rural telephone or power company) that is both cross subsidized and given preferential government sponsored financing could take over the system. In other words, if the burden is too high -- either because the rate structure does not allow sufficient return, or the administrative process creates too great a barrier to justifying a reasonable rate, the government could in essence be "confiscating" private property for the benefit of governmental, or governmentally supported entities. The Commission itself has noted in this proceeding that such a result is likely to be unconstitutional.

The underlying question for the Commission is how to avoid creating an administrative structure and regulatory procedures that are so complex or burdensome that they have the unintended consequences mentioned above. Even more, given that the Commission has a mandate in the law to seek ways to lessen if not eliminate the administrative burden and cost of rate regulation on smaller systems, the question becomes how that can be done when the Commission itself recognizes what Congress apparently did not: that rate regulation of the cable television industry is inherently a complex undertaking. Unlike a utility which

offers a single, definable product or service to the customer, cable offers a vast variety of services. Unlike a utility, cable's services and products all have differing perceived values -- from the delivery of over-the-air broadcast signals, which the consumer could just as easily get in other ways, to the delivery of variously valued (by each individual) cable channels or pay-per-view channels. While Congress may have found cable to be a de facto single provider of video services via wire into the home, it did not and could not declare such provision a "necessity" -- especially since almost 40 percent of the people who have the service available to them choose not to take it. Thus rate regulation for the first time must take into account the issues of marketing, discounting, consumer incentives to purchase and the like. This is about as non-traditional as one can get in the field of rate regulation and it creates many special problems. Thus the "solutions" are not as simple or as clear as one would hope. For the smaller operator, and, we suspect, the smaller franchising authority, potentially the "best" way to avoid all the complications and all the potential burdens, expenses, and unintended consequences is to avoid rate regulation all together.

LOCAL AUTHORITIES ARE THE SOLE DETERMINERS OF WHETHER BASIC SERVICE RATES ARE REGULATED.

The new Cable Law is very specific with regard to the Commission's jurisdiction over the regulation of basic service rates. It is only when a community applies for certification to

regulate those rates and that certification is either not granted or is subsequently withdrawn by the Commission that the Commission then steps in to regulate. Congress specifically left the initial determination of whether there was a need to regulate at all to local officials. This initial screening is vitally important for small systems and small communities. We believe as an administrative matter it is also critical for the Commission.

Local authorities best know the circumstances. Both Congress and the Commission have recognized the unique situation cable operators are in smaller communities. Cost structures are different, services are different, the relationships in the community are often different and in many cases the complaint if any, about cable is not related to cost or service but to the fact that the more rural residents want more of it and the cable operator, for economic reasons is finding it difficult to extend its lines as fast as the public wants. This same situation held true in the past for the provision of both telephone and electricity in rural America. Both were subsequently given government assistance to extend their services. This is not the case with cable. We have done it on our own. But the "service" might look different from that expected in a larger, more urban community. For instance in some small communities there is only one single service offering including what is now being distinguished as "basic," "satellite services" and "pay". The pricing may be different. The costs to deliver the service are certainly higher. All of these are known ingredients in rural

America. Local authorities know the problems, are just as concerned about becoming involved in government red tape as are the operators, and might logically conclude that such red tape might ultimately lead to more, not less, burden to subscribers in that community. Thus it would be totally appropriate to decide AGAINST becoming involved in the rate regulatory regime available pursuant to federal regulations. This is a decision for local authorities to make and one the Commission does not have the authority (and should certainly not have the desire) to overrule.

Local authorities may choose not to regulate. This issue is probably the single most important one for smaller rural cable systems. It is CATA's view that a significant number of smaller local authorities will in fact choose not to participate in the rate regulatory process. They will understand that the costs and burdens imposed on the cable operator and, for that matter, the costs and burdens imposed on the community in terms of legal fees, delays, etc. will all ultimately flow through to the constituent/subscriber. Regulation in these cases may very well increase costs to consumer purely through the legal and administrative cost of the regulation itself.

The Commission, too, must look at the "burden" issue realistically. More than 50 percent of the franchises in this country are for systems of under 1000 subscribers. Those franchised communities are the least likely to have the personnel or expertise to engage in any sort of rate making proceedings. To be sure there are law firms and consultants who specialize in sell-

ing their services to communities and who are gleeful at the prospect of such a large new client base. But ultimately someone must pay those costs -- and local officials have no illusions as to who that "someone" ultimately will be! Neither do consumers. The alternative for these communities is to seek certification under the Commission's processes and not be qualified, thus throwing the burden on the Commission of exercising its jurisdiction in all of these cases. The number of small systems and potential rate proceedings affecting them could swamp both the systems and the Commission process.

It is far better to allow the local authorities to act as the initial filter as to whether basic rate regulation is appropriate or not. That is how Congress designed the law -- to allow that local filter to work. Since there is no time limit on when a local authority could seek certification and begin the process of basic rate regulation, CATA suggests that the Commission itself might even suggest to small communities that they delay seeking such certification en masse until the process has had some chance to operate and accumulate reliable data. If, after a period of time in which the Commission and larger communities establish the general "standards" that will govern basic rates, a smaller community finds that its operator is charging rates well outside the national norm (something the Commission will be publishing yearly) then it could always seek certification and apply the standards set by the Commission. The benefit of such an approach is that if the community and the operator

chose to avoid the burdens inherent in initiating rate regulation under the statute and subsequently found that their rates and service were within the norm, or were satisfactory for the peculiar needs of that community, a great deal of administrative cost and burden for the operator, the community and the Commission would have been avoided.

Scheduling certification according to community size. CATA further suggests to the Commission that it implement its processes in such a way as to encourage the potential result outlined above. This can be done in several ways. First, the Commission, as noted above, could affirmatively state and urge smaller communities to delay seeking certification until such time as the standards and norms are more clearly established instead of instantly seeking certification which may jeopardize the ability of the Commission to efficiently operate at all in this regard. A stronger approach would be to design the certification process on a graduated scale. That is, establish rules for certification that allowed the largest communities, serving the largest number of cable subscribers, to seek certification first, then have a sliding time scale for smaller cities and finally the smallest communities to seek certification. This approach would assure that the largest number of subscribers would potentially "benefit" from the regulatory oversight quickly, as presumably Congress wanted, by limiting the administrative burden on the Commission of communities large and small seeking certification all at once. It would also give some "breathing

room" for the operators, the cities and the Commission to determine what the new "basic service" norms will be. This, in turn might add impetus to the decision of a larger number of smaller communities to forego the certification process and rate regulatory burdens for them or for the Commission should it appear that their operator is already offering service within the norms, thus vitiating the need for any regulatory action. The "filter" would have been given time to work. All parties would have benefitted -- especially the consumer.

Were the Commission to adopt some variation of CATA's proposal to implement certification over a period of time based on community size it could, of course, create a mechanism whereby a community, regardless of size that believed it had an egregious situation needing immediate relief could petition for immediate certification.

Smaller communities lack personnel. The difficulty, and almost the impossibility so far as the burden it could potentially place on the Commission, of smaller communities seeking certification is that they, in almost every circumstance, will not be able to certify that they have adequate trained personnel to administer the Commission's rules, whatever they are. Many small communities have no full time personnel other than for emergency services, and many times not even that. Their only recourse would be to retain the "hired guns" -- the consultants -- who would create the very cost burden on the community and the cable operator (and subsequently the subscrib-

er) that Congress said was to be avoided.

For the Commission to successfully circumvent this anti-consumer situation in those areas where certification is sought it can only do one thing: create rate standards that are in essence self-explanatory.

FLEXIBLE "BENCHMARK" RATES FOR BASIC SERVICE ARE APPROPRIATE

Other parties in this proceeding will be filing econometric studies to support the notion that the Commission's tentative conclusion that benchmark rates are appropriate is correct. CATA, too, supports that conclusion. We do so, however, from an operational standpoint. Much of the Commission's rule making document is filled with inquiries regarding how various other approaches to rate regulation might be accomplished. The Commission itself notes the many difficulties and the almost hydra headed nature of a cost-based structure. A traditional rate of return formulation would probably result in higher costs to consumers than are presently the case, certainly not what Congress had hoped for, and the determination of what is "reasonable" is no closer to resolution.

Benefits of a benchmark. The benchmark approach has many benefits, especially if it is constructed flexibly. The greatest one is that it has the potential of being designed in such a way that it is in essence self-executing. Systems and communities can apply a relatively simple formula to establish the zone of

reasonableness in their community and see, without further ado, whether the operator's rates, or proposed rates fall within the zone. Actions can be taken, business plans can be designed based on a relatively simple application of the standards. Any other approach would constitute an undue and expensive burden on smaller operators.

Effective competitive rates may not be compensatory. The critical aspects of such a benchmark approach are the initial determination of the base rate and the allowable formula for determining particular circumstances. As the Commission noted, looking at the base rates in those areas where there is presently effective competition is just one of the criteria established by Congress. While CATA concurs that the investigation the Commission is presently conducting in those areas should be beneficial and provide one of the bases for the bottom-line benchmark, we also want to caution the Commission regarding the import of some of the data it is receiving. In particular, the Commission must keep in mind the fact that the effective competitive rate may not in fact be compensatory. Many of the systems rhetorically cited in Congressional debate as having lower rates because there were competitive cable systems were in fact in the process of competing for market share. The systems, because they were in the main new, had not yet established equilibrium rates which would allow them to not only survive but continue to develop. It is CATA's view that many of the "competitive" market-share fights now going on in communities, if they continue for

any length of time will ultimately lead to a diminution of service to the public and the failure of one if not both competitive systems. This is not in the public interest. It is certainly not a logical basis upon which to base nationwide rate regulatory standards! Just as with the "price war" between two gas stations, the consumer might benefit in the short term by lower rates, but will suffer in the long term by either the severe curtailment of service (or indeed the demise of one if not both of the combatants) or sharply increased prices required to repair the damage done by a below-cost competitive market share struggle.

Rates for municipally owned systems. Another cautionary note is to be wary of the makeup of the reported rates themselves. As we stated earlier, rates for cable service are unlike any the Commission or most other agencies have ever grappled with before. Judgements as to value are laden with variables that are not so easily established in economic models. In some cases a competitive rate may not be what it seems. For instance, in one community where the Commission has sought data relating to a "competitive" cable situation where a city-owned system is now competing for market share with an established private system the "basic" rates are admirably low - lower than the industry norm. So low, in fact, that the city is unable to repay the bonds it took out to build the system from the income of the system. The result: a specific property tax increase to cover the bond costs! The "low" cable rates offered by the city

owned system are not "low" at all. They are simply hidden by a tax cross subsidy. (Municipally owned systems do not operate on a profit-making basis and, in many cases, cross-subsidize their operations with other city services.) The Commission's analysis of rates in "competitive" communities must take all of these variables into account.

CATA supports the notion that the competitive rates, therefore, are just one part of the analysis. The existing price structure in the cable industry is another. And, as the law specifically enumerates, a "reasonable profit" is yet another aspect of the benchmark determination.

Whether the Commission should establish a single benchmark or several, depending on the system variables that it has set out in this proceeding is a decision that must await further study of the data just now being received from the Commission's questionnaires. In either case, CATA maintains, the Commission must include a formula or matrix of adjusters to the basic benchmark.

Special benchmark considerations for small systems. From a small system perspective, the most significant adjusters to be included would be for density, capital cost, and the availability of alternative revenue streams. We need not dwell on these at length since the Commission itself seems to already acknowledge them. Smaller, more rural systems are more expensive to build and maintain both because in many instances they are not built by the largest MSOs, who benefit from the ability to purchase in volume, and more importantly because there are simply fewer

subscribers per mile to defray the costs. Capital costs per mile of cable plant and capital costs per subscriber for reception and processing equipment at the headend are all higher than the average cable system. At the same time, opportunities for alternative revenue are less.

For example, in CATA's experience there are few if any systems of under 5000 subscribers engaging in extensive local advertising insertion. Those that do are just now achieving the ability to recover the cost of such insertions, and that is true only because the insertion equipment has finally reached a price that is realistic for such systems to consider. Other alternate revenue streams are also limited. While penetration may be higher in smaller, more rural communities, pay penetration, which is marketing driven, is lower. Smaller systems do not have the available consumer base to justify expensive marketing to increase that penetration just as the available local advertiser base is not sufficient to justify extensive marketing of advertising avails. Thus, smaller operators are far more dependent on revenue from the basic cable services, including cable programming services. Because the cost of capital is also higher for smaller companies, it is not unusual for the rates charged for basic services to reflect a built in reserve for future upgrading of the system as a self-financed mechanism. All of these considerations must be included when the Commission establishes a benchmark formula to determine appropriate rates.

Customizing the benchmark. Ideally the Commission will be

able to establish a benchmark or benchmarks that will then be used as the base for a simplified formula allowing percentage increases over the base rate depending on the variables found in a given system. For instance, a base rate determined to be reasonable of x cents per channel (since clearly the number of channels offered is one of the key variables -- and within that number presumably a different rate for those channels with video received directly off-air as opposed to those received via satellite or microwave) plus a percentage multiplier for the identified key variables such as density below certain thresholds (i.e. below 40 homes per mile, 30 homes per mile, 20 homes per mile, 15 homes per mile -- with added "credit" the lower the density). Additional multipliers should be accorded for all the other variables the Commission suggested which it finds directly affect costs such as above average programming costs, a higher proportion of underground construction, terrain crossed, etc. The full set of variables can only be determined upon further study and data accumulation by the Commission. Other adjustments would then be made, as the Commission has already noted, for such additional costs as franchise fees, PEG costs, etc. that are unique to each system.

Hopefully this type of customized benchmarking would then result in a determination of a reasonable rate target for the given cable system. If the system's rate, or proposed rate was within a reasonable percentage variance zone (CATA would suggest a minimum of a 10% variance recognizing the unscientific nature

of the regulatory structure proposed) of that benchmark, then the rate would be considered reasonable, and no further action would be needed. If the rate exceeded the zone of reasonableness, then the operator would have the option of either altering the rate structure to come within the zone or seek to justify its rates by some other method.

Only the cable operator may impose rates. In direct response to one of the many questions posed by the Commission, CATA does not believe the Commission or a franchising authority should or does have the authority to impose rates in those cases where the operator's rate is deemed to not meet the standard. It is for the operator and the operator alone to come into compliance or justify the variance. The Commission or the community does not have the authority to assume control of the operational aspects of a private business.

Price caps are not appropriate. CATA also specifically opposes price caps being applied to those systems which turn out to be charging below the benchmark zone. This penalizes systems that have maintained lower than reasonable rates. While some may assume that a "below benchmark" system will automatically "bump" its rate to take advantage of the Commission's calculations, that is not necessarily the case. Those systems have maintained lower rates for one of many reasons. Either there is something unique in the community that is not taken into account in the Commission's formula, such as high unemployment, which forces a lower market rate, or the operator had planned a series of